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No. 98-492

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

BEVERLY HEALTH AND REHABILITATION SERVICES, INC., *et al.*,

Petitioners,

vs.

GERALD KOBELL, Regional Director for Region Six of the National Labor Relations Board for and on behalf of THE NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF *AMICUS CURIAE* AMERICAN HEALTH CARE ASSOCIATION IN SUPPORT OF PETITIONERS

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CONSENT TO FILING

This *amicus curiae* brief is filed pursuant to Supreme Court Rule 37.3 with the written consent of all parties in interest. Letters of consent are filed with the Clerk of the Court.[1]

INTEREST OF THE *AMICUS CURIAE*

The American Health Care Association ("AHCA") is a federation of 50 state health organizations, together representing nearly 12,000 non-profit and for-profit assisted care providers that care for more than one million elderly and disabled individuals nationally. The AHCA represents and advocates for the nation's long-term care community and for individuals who, because of social needs, disability, trauma or illness, require services provided in a long-term care setting.

This case requires this Court to apply Section 8(g) of the National Labor Relations Act ("NLRA" or "the Act"), 29 U.S.C. § 158(g), which explicitly requires labor organizations to provide health care institutions with ten-days written notice before engaging in a strike or picketing. The statute's sole exception permits strike notice to be extended with the written consent of the parties. This notice requirement is immensely important to the AHCA, whose member institutions are entrusted with maintaining uninterrupted care to the elderly and disabled.

Notwithstanding clear statutory language and its salutary purposes, the National Labor Relations Board ("NLRB" or "the Board") has created a 72-hour exception. There is *no basis* in the unambiguous statutory language for this exception which, in effect, eviscerates the benefit of the notice to health care institutions. In the underlying Section 10(j) injunction proceeding, the district

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1. Counsel for a party did not author this brief in whole or in part and no person or entity, other than the *amicus curiae*, its members, or counsel, have made a monetary contribution to the preparation or submission of the brief.

court erred by adopting an unduly deferential standard of review of the Board's interpretation of Section 8(g). Regardless of which injunction test applies, the district court was incorrect in upholding the Board's extra-statutory interpretation of Section 8(g). It is of critical importance to the AHCA and its members that this error be corrected by this Court.

I.

THE SECTION 10(j) AND 8(g) ISSUES SIGNIFICANTLY IMPACT THE AHCA'S MEMBERSHIP AND THE PATIENTS SERVED BY HEALTH CARE INSTITUTIONS.

The health care industry is extremely concerned about how the Board's continued misinterpretation of Sections 10(j) and 8(g) of the National Labor Relations Act undermines its right and duty to provide uninterrupted care. Here, the district court, applying an unduly deferential standard of review, granted the Board's request for injunctive relief under Section 10(j) requiring certain health care facilities operated by Petitioners to reinstate employees who engaged in an unlawful strike under Section 8(g). The district court acknowledged it found the Board's extra-statutory interpretation of Section 8(g)'s notice requirement faulty. (Petition, Apdx. D-54). The district court, nevertheless, felt constrained by the precedent of the U.S. Court of Appeals for the Third Circuit to adopt the Board's view and grant the injunction request.

This issue is of critical — perhaps life or death — importance to the AHCA's member nursing homes. Preparing a health care institution to operate in the face of a strike is an enormous and time-sensitive effort which may be effectively nullified by even a short delay. Indeed, the impact of a 72-hour exemption to Section 8(g)'s ten-day notice requirement cannot be discussed in the abstract. When confronted with a ten-day strike notice, a health care facility must find qualified people to care for its elderly and infirm patients. Since nursing personnel must be trained prior to

working with patients, this is no perfunctory task. It might prove necessary for a facility to search surrounding and even distant communities to obtain suitable staff prepared to work on a date specified in the ten-day strike notice. If a union is free to unilaterally extend a strike notice, there is a strong likelihood that conditional workers would return to other employment. In sum, a unilateral extension of a strike notice could effectively preclude a nursing home from finding replacements when a strike actually takes place. The resulting danger to patient care is exactly what Congress sought to avoid in enacting Section 8(g).

The health care industry joins Petitioners in urging this Court to review two issues: 1) the split among the judicial circuits concerning the proper standard for analyzing Board requests for Section 10(j) injunctions and 2) the Board's *sua sponte* creation of a 72-hour exception to Section 8(g)'s explicit 10-day notice requirement. As asserted in the Petition, this Court has not, in the statute's fifty (50) year history, reviewed any appellate interpretation of Section 10(j). Additionally, if not rejected here, the Board's extra-statutory modification of Section 10(j) is likely to cause these issues to again go before this Court in the same procedural posture. Therefore, the AHCA respectfully requests this Court grant the Petition and review these issues of immense significance to the health care industry.

II.

BY PERMITTING UNIONS TO UNILATERALLY EXTEND SECTION 8(g)'S EXPLICIT NOTICE REQUIREMENT, THE BOARD HAS AGAIN IGNORED THE CLEAR STATUTORY LANGUAGE OF THE ACT.

The NLRB has a history and established track record of administratively "amending" the NLRA when it suits the Board's policy objectives. For example, in *NLRB v. Health Care and Retirement Corp.*, 511 U.S. 571, 114 S. Ct. 1778 (1994) ("*HCR*"), this Court rejected the Board's effort to administratively modify

the standard for determining supervisory status contained in Section 2(11) of the NLRA. Specifically, the Board contended that nurses's fulfillment of supervisory indicia related to patient care was not in the "interest of the employer" as enumerated by Section 2(11). This Court rejected the Board's effort to create a "statutory dichotomy" particularly addressed to health care institutions, finding patient care *was* the interest of a health care employer. 114 S. Ct. at 1783. This Court also rejected the Board's reliance on legislative history to the NLRA and its 1974 amendments to support its modification of the Act's express statutory language.

The Board's effort to unilaterally amend the Act as applied to health care institutions in the instant case mirrors those this Court rejected in *HCR*. Section 8(g), provides, in relevant part:

> A labor organization before engaging an any strike, picketing, or any other concerted refusal to work at any health care institution shall, not less than ten days prior to such action, notify the institution in writing. . . . The notice shall state the date and time that such action will commence. The notice, once given, may be extended by the written agreement of both parties.

29 U.S.C. § 158(g). In addition to detailing the time and form of the notice unions must give health care employers prior to taking the enumerated actions, Section 8(g) provides the sole means for extending the notice — *the written agreement of both parties*. Despite the unequivocal statutory language, the Board has interpreted Section 8(g) to allow unions to extend a strike notice by 72 hours. *Bio-Medical Applications of New Orleans, Inc.*, 240 N.L.R.B. 432 (1979). The Board's refusal to consistently apply the Act to health care institutions, as countenanced by the U.S. Court of Appeals for the Third Circuit, requires this Court's review.

A. Congress Enacted Section 8(g) To Allow Health Care Institutions To Provide Uninterrupted Care To Patients.

The Board and reviewing courts have recognized Section 8(g) was enacted to protect patients from disruptions in care. "At a health care institution, disruption in patient care of even a few hours may cost lives." *NLRB v. Washington Heights-West Harlem-Inwood Mental Health Council, Inc.*, 897 F.2d 1238, 1247 (2d Cir. 1990). As the Ninth Circuit observed,

> *Strict adherence to notice requirements is essential in the area of health care institutions*, in light of Congress' concern "that sudden, massive strikes could endanger the lives and health of patients in health care institutions."

NLRB v. Stationary Engineers Local 39, 746 F.2d 530, 533 (9th Cir. 1984) (quoting *Walker Methodist Residence and Health Care Center*, 227 N.L.R.B. 1630, 1631 (1977)) (emphasis added). The court also found:

> Section 8(g) and its legislative history make it clear that Congress was particularly concerned with the necessity that health care institutions be apprized sufficiently in advance of any planned picketing or other work stoppages in order to allow the health care institution to take steps to protect the continuity of the health care services it renders to its patients.

Stationary Engineers, 746 F.2d at 533 (citing *District 1199-E Hospital and Health Care Employees*, 243 N.L.R.B. 23, 24 (1979)). Recognizing health care institutions need accurate notice of any work stoppage, Congress specifically provided in Section 8(g): "The notice shall state the date and time that such action will commence." 29 U.S.C. § 158(g).

Congress's respect for the responsibility of health care institutions to give continuous care to patients is also reflected in the sole method for extending notice recognized in Section 8(g):

"The notice, once given, may be extended by the *written agreement of both parties*." 29 U.S.C. § 158(g) (emphasis added). Requiring the health care institution's written agreement prior to extended a strike date assures the institution of the opportunity to assess whether it will have sufficient time to adjust its strike preparation plan. Alternatively, the health care institution may require the union to give it another ten-days' notice. A union's unilateral extension of a strike notice as advocated by the Board does not assure patients will receive uninterrupted care.

B. The Board Created A 72-Hour Exception To Section 8(g)'s Ten-Day Notice Requirement.

Despite Section 8(g)'s explicit, unambiguous notice requirement, the Board "amended" Section 8(g) to permit a union to unilaterally extend its strike notice by up to 72 hours in *Bio-Medical Applications of New Orleans, Inc.*, 240 N.L.R.B. 432 (1979). The Board's self-created exception to Section 8(g)'s notice requirement is unsupported by the text of the statute or its legislative history.

In *Bio-Medical*, the union unilaterally extended its strike notice by 24 hours. Strictly applying Section 8(g), the administrative law judge determined the strike was unlawful because the union's extension was unilateral and lacked the requisite written consent of both parties. *Bio-Medical*, 240 N.L.R.B. at 438. Deeming it undisputed that "the union did not comply with the literal terms of Section 8(g)," the Board nonetheless found:

> It is thus clear that Congress, as revealed through its committee reports and the remarks of two of the leading proponents of the health care amendments, not only contemplated, but specifically approved, a labor organization's extension of the time set forth in the initial 10-day notice for the commencement of a strike *by unilateral notification to the employer*. . . .

Id. at 435 (emphasis added). The Board also found the use of "may" in Section 8(g)'s last sentence meant that the written agreement of the parties was not the "exclusive manner of extending an initial strike date." *Id.* at 434. Because the union gave the health care employer at least 12 hours notice of the new strike date, the Board found the union in compliance with Section 8(g). *Id.* at 435.

C. The Board's Interpretation of Section 8(g) Is Improper Because The Statutory Language is Clear and Unambiguous.

> The Act is to be enforced according to its own terms, not by creating legal categories inconsistent with its meaning, as the Board has done in nurse cases. Whether the Board proceeds through adjudication or rulemaking, the statute must control the Board's decision, not the other way around.

NLRB v. Health Care & Retirement Corp., 511 U.S. 576, 114 S. Ct. 1778, 1783-84 (1994). Because Congress chose for Section 8(g) extremely clear language concerning when strike notice must be provided to health care institutions, the Board's application of the statute in *Bio-Medical* cannot be sustained.

1. *The Board's Construction of Section 8(g) Is Unsupportable Under the Chevron Standard.*

"The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 fn. 9, 104 S. Ct. 2778, 2781 fn. 9 (1984) (citations omitted). In *Chevron*, this Court set the standard for a federal court's review of an agency's construction of the statute it administers:

> First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter;

> for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.

467 U.S. at 842-43, 104 S. Ct. at 278. If Congress has not addressed the precise question at issue, then the court must determine if the agency's construction is permissible. 467 U.S. at 843, 104 S. Ct. at 2781-82.

In the present case, Section 8(g) clearly delineates the condition under which a union's ten-day notice may be extended — the written agreement of both parties. Because Congress unambiguously spoke of the circumstance under which strike notice may be extended, the Board's *sua sponte* creation of an exception to Section 8(g) permitting a union to unilaterally extend notice cannot stand.

2. *The Board's Reliance on Legislative History Is Flawed Because Section 8(g)'s Notice Provision Is Clear.*

The clear, unambiguous nature of Section 8(g)'s ten-day written notice requirement precludes any need to resort to legislative history. As discussed above, Section 8(g) in no uncertain terms requires unions to provide health care institutions with ten-days written notice prior to commencing a strike or picketing. 29 U.S.C. § 158(g). In *Bio-Medical*, however, the Board eschewed Section 8(g)'s clear language in favor of Senate and House committee reports and the remarks of a few Congressmen. 240 N.L.R.B. at 434-35; S. Rept. 93-766, 93d Cong. 2d sess. 4; H. Rept. 93-1051, 93d Cong. 2d sess. 3. The reports cited by the Board opined "it would be unreasonable, in the Committee's judgment, if a strike or picketing commenced more than 72 hours after the time specified in the notice." *Id.*

Using this committee report as a basis for the Board to "amend" Section 8(g) is reminiscent of the Board's tortious construction in *HCR*. There, the Board attempted to circumvent the clear meaning of the Act through reference to the legislative history cited by the Board in *Bio-Medical*. This Court rejected the

Board's effort to subordinate the statutory language to isolated references to committee reports. "It is the function of the courts and not the Legislature, much less a Committee of one House of the Legislature, to say what an enacted statute means." *HCR*, 511 U.S. 580, 582, 114 S. Ct. 1778, 1784 (1994) (quoting, *Pierce v. Underwood*, 487 U.S. 552, 566, 111 S. Ct. 1539 (1988)). This Court should also reject the Board's efforts to reach beyond the statute because Section 8(g)'s notice provision is clear and unambiguous.

3. *Proper Construction of the Legislative History Does Not Support the Board's Interpretation of Section 8(g).*

This Court has declined to rely on legislative history discussing language or issues not incorporated within the statute. *See United States v. American College of Physicians*, 475 U.S. 834, 845-46, 106 S. Ct. 1591, 1598 (1986) (committee reports were improper basis to determine Congressional intent concerning issue not addressed by statutory language). As discussed above, the Board in *Bio-Medical* based its interpretation of Section 8(g)'s explicit notice requirement on inconclusive statements in committee reports and isolated comments by Congressmen. It is axiomatic Congress would have included the 72-hour exception to Section 8(g)'s ten-day notice requirement *if a majority of members desired to include such language.*

In fact, comments by a Senator *not* cited in *Bio-Medical* demonstrate congressional representatives advancing a broader interpretation of Section 8(g) could not gain sufficient support among their colleagues to include such language in the statute. Senator Fannin specifically noted during debate on Section 8(g) that the Senate Committee Report was "in many respects a curious document [because] there is an obvious intent to substitute intent of the Senate for the words of the law." 120 *Cong. Rec.* 12994 (May 2, 1974). Senator Fannin noted several instances, including whether unions could unilaterally extend strike notices, in which the committee report expressed "the sense on the committee". *Id.* Senator Fannin asked continually, "Why not put it in the law itself?

If the words of the law are clear, courts do not look to Congressional intent." *Id.* (Emphasis added). As Senator Fannin's inquiry illustrates, the committee was aware its comments would not bear the weight of the statutory language.

Rather than apply the text of Section 8(g), the Board has elevated pieces of legislative history beyond the enacted law. As such, the Board has contravened this Court's explicit instructions.

4. *Courts of Appeals Have Looked To Section 8(g)'s Express Statutory Language In Rejecting Contrary Legislative History.*

Where the statute's language is clear, reviewing courts have applied Section 8(g) by its terms. For instance, courts have been asked to address whether Section 8(g) is applicable to individuals. The statute provides that "a labor organization" must give ten-days written notice of strike or picketing to a health care institution. 29 U.S.C. § 158(g). During Congressional debates of the 1974 Health Care Amendments, however, Senator Taft, one of the authors of the amendment, stated: "It would not be protected activity for employees acting without a labor organization to engage in a work stoppage or picket without giving the required notice." 120 *Cong. Rec.* 12945 (1974).

In addressing this conflict between Section 8(g)'s statutory language limiting the notice obligation to labor organizations and the contrary legislative history, courts have relied on the statute. *See East Chicago Rehabilitation Center, Inc. v. NLRB*, 710 F.2d 397, 403 (7th Cir. 1983) ("[e]very other decision has read Section 8(g) to mean what it says: the notice requirement is applicable only if the strike is by a labor organization."); *Montefiore Hospital and Medical Center v. NLRB*, 621 F.2d 510, 515 (2d Cir. 1980) ("[w]e cannot conclude that the legislative history requires us to ignore the unambiguous language of Section 8(g)."); *Kapiolani Hospital v. NLRB*, 581 F.2d 230, 234 (9th Cir. 1978) ("the notice requirement of Section 8(g) should be read in accordance with its clear language.").

Similar to limiting the notice requirement to labor organizations, the clear language of Section 8(g) unequivocally provides the statute's ten-day notice requirement may be extended with the written agreement of the parties, regardless of any arguably contrary sentiments in the legislative history. The AHCA submits this Court should similarly require the Board to respect the clear, unambiguous language of Section 8(g).

D. No Reviewing Court Has Ever Upheld The Board's 72-Hour Exception to Section 8(g)'s Notice Requirement.

Significantly, *no reviewing court* has ever been fooled by the Board's emphasis on extraneous comments in the legislative history of Section 8(g) to the detriment of the statutory language. In fact, the Second Circuit has expressly rejected the Board's contention that Section 8(g)'s explicit notice requirement is somehow nullified by its legislative history. *NLRB v. Washington Heights-Mental Council, Inc.*, 897 F.2d 1238 (2d Cir. 1990).

In *Washington Heights*, the Board found a union's strike to be lawful under Section 8(g) even though the union unilaterally delayed the strike for one day without notice to the health care institution. The Board concluded that the union's failure to give 12 hours notice was not important since the health care institution was prepared for the strike. The Board also concluded that the union's strike was an unfair labor practice strike and, as such, was exempt from Section 8(g). In holding that unfair labor practice strikes were exempt from Section 8(g), the Board relied upon the same legislative history that it cited in crafting the 72-hour exception.

The Second Circuit rejected the Board's position stating:

> Given that the Center might well have figured out that the strike was to begin on the morning of September 29, we might appear unduly parsimonious about compliance with the notice requirement. *We are not . . . at liberty to depart from the straightforward unambiguous language of the statute requiring the*

> *Union to specify in writing the date and time it would strike.* Furthermore, we are convinced that the notice requirement is appropriately read strictly. At a health care institution, disruption in patient care of even a few hours may cost lives. "Strict adherence to notice requirements is essential in the area of health care institutions, in light of Congress' concern 'that sudden, massive strikes could endanger the lives and health of patients. . . .' " *NLRB v. Stationary Eng'rs, Local 39*, 746 F.2d 530, 533 (9th Cir. 1984) (citation omitted).

Washington Heights, 897 F.2d at 1247 (emphasis added).[2]

The Second Circuit casts doubt on the Board's reliance on Section 8(g)'s legislative history when the statutory language is unmistakable:

> We have doubts about the force of this legislative history. This language carves an explicit exception to the notice requirement. . . .Where the full Congress has not done so, we cannot create an exception to the Act. To borrow the words of Justice Cardozo: "We take the statute as we find it." *Anderson v. Wilson*, 289 U.S. 20, 27, 53 S. Ct. 417, 420 (1933).

897 F.2d at 1247. The AHCA submits Petitioners' position that *Washington Heights* clearly expresses the Second Circuit's *repudiation* of the Board's interpretation of Section 8(g) is correct.

The gravamen of the case at bar is the Board's refusal to apply the explicit provisions of Section 8(g). Instead, the Board obviously intends to apply the version of Section 8(g) which was suggested by the Senate committee, but *rejected by Congress as a whole*. It does so under the guise of "interpreting" the statute. This is a

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2. The Second Circuit found it unnecessary to rule directly on the Board's construction of Section 8(g) since, even under the Board's construction, a union must provide at least 12 hours of supplementary notice, and the union in that case had failed to do so.

transparent attempt to ignore the will of Congress, and its stated policy of protecting the rights of patients to continuous and uninterrupted health care.

E. The Board Has Ignored The Rights Of Individuals That Congress Intended Section 8(g) To Protect.

By focusing exclusively on collective bargaining rights in its analysis of Section 8(g), the Board has completely ignored the interests of patients in health care institutions. These interests were well-described by the Second Circuit in *Washington Heights*:

> . . . Section 8(g) notice is not designed to protect the interest of either employers or employees. *Section 8(g) notice protects the interest of third parties for whom an unanticipated work stoppage may be a life-or-death matter*. We are reluctant to conclude that the full Congress intended to sacrifice the safety of the sick or dying to help labor organizations at health care institutions avoid a ten-day delay in going on strike.

897 F.2d at 1248 (emphasis added).

The Board clearly has lost sight of its responsibility to balance collective bargaining rights with the interests of patients in health care institutions. Therefore, the AHCA, on behalf of the health care industry, urges this Court to join the Second Circuit in rejecting the Board's overreaching, tortured "amendment" of Section 8(g).

III.

THE DISTRICT COURT'S "RUBBER STAMP" OF THE BOARD'S BASELESS INTERPRETATION OF SECTION 8(g) SHOWS WHY THIS COURT MUST ADOPT THE TRADITIONAL TEST FOR 10(j) INJUNCTIONS.

As discussed in Point I, *supra*, the Board's *sua sponte* creation of an exception to Section 8(g)'s notice requirement has no basis

in the statute. In fact, the district court initially reviewing the Board's injunction request acknowledged that Section 8(g) "makes no mention" of a 72-hour unilateral extension. *See* Petition at Appendix C-21. The district court, however, felt constrained by Third Circuit precedent from addressing the Board's legal theory when evaluating the Section 10(j) injunction request. *Id.* at Appendix C-22. The AHCA submits that the bizarre result in the instant matter exemplifies why this Court must resolve the schism among the Courts of Appeals and require federal courts to review Section 10(j) injunction requests as they would other injunction petitions.

A. Section 10(j) Extends Extraordinary Authority to the Board to Pursue Injunctive Relief.

Section 10(j) provides that the Board may seek an injunction in federal district court "upon issuance of a complaint" alleging an unfair labor practice. 29 U.S.C. § 160(j). In other words, the Board may request an injunction prior to conducting a hearing on the merits of the alleged unfair labor practice. Section 10(j) gives district courts jurisdiction to grant the Board an injunction where the court deems it "just and proper", a standard not defined by Section 10(j). 29 U.S.C. § 160(j).

The extraordinary authority Section 10(j) grants the Board is exemplified by the present case. To ensure continuous medical care and living assistance to patients and residents, Petitioners took steps to hire a replacement staff. Rather than terminate employees engaged in the unlawful strike, Petitioners placed the strikers on a preferential reinstatement list. The district court, *without substantively addressing the legality of the strike*, ordered Petitioners to reinstate all strikers and displace, if necessary, all replacement workers. Employees who engage in a strike that violates Section 8(g) lose their protected status under the Act; such employees are not entitled to reinstatement, and are even subject to discharge. In effect, the district court, absent a substantive hearing or even a cursory review of its legal position, deprived

Petitioners of rights clearly afforded it by the Act while forcing them to take adverse action against the replacement workers.

B. This Court Should Adopt the View of Those Courts of Appeals Which Apply the Traditional Four-Part Test To Section 10(j) Injunction Requests.

The extraordinary remedial measures afforded the Board by Section 10(j) require this Court to apply the traditional four-part test used by federal courts to evaluate Section 10(j) injunction requests. This standard is currently applied to test the propriety of 10(j) injunctions by the Courts of Appeals for the First,[3] Second,[4] Seventh,[5] and Ninth Circuits,[6] and the District Court for the District of Columbia.[7] The traditional standard requires the party moving for an injunction to demonstrate:

1. a likelihood of success on the merits;
2. a probability of irreparable harm if relief is not granted;
3. that such injury outweighs any harm preliminary relief would inflict on the defendant; and
4. that the preliminary relief is in the public interest.

Pye v. Sullivan Bros. Printers, Inc., 38 F.2d 58, 63 (1st Cir 1994).

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3. *Pye v. Sullivan Bros. Printers, Inc.*, 38 F.2d 58, 63 (1st Cir 1994).

4. *Kaynard v. Mego Corp.*, 633 F.2d 1026, 1033 (2d Cir. 1983) (traditional equitable principles considered in evaluating 10(j) injunction requests).

5. *Kinney v. Pioneer Press*, 881 F.2d 485, 490 (7th Cir. 1985).

6. *Miller v. California Pacific Medical Center*, 19 F.3d 449, 457 (9th Cir. 1994).

7. *D'Amico v. U.S. Service Industries, Inc.*, 867 F. Supp. 1075, 1085 (D.D.C. 1994).

The Courts of Appeals for the Third,[8] Fifth,[9] Sixth,[10] and Tenth[11] Circuits, however, employ a test requiring the Board meet a minimal two-part test to obtain a 10(j) injunction. First, the Board must establish "reasonable cause" to believe the unfair labor practice occurred. *Gottfried v. Frankel*, 818 F.2d 485, 493 (6th Cir. 1987). Although not contained in Section 10(j), this prong was included by courts applying the two-part test as an additional, less onerous requirement than the traditional "likelihood of success on the merits" standard. *D'Amico v. United States Serv. Indus., Inc.*, 867 F. Supp. at 1081-82; *D'Amico v. Townsend Culinary, Inc.*, No. Civ. A. AW 98-2673, 1998 WL 687228, *3 - *4 (D. Md. September 30, 1998). The second part of the two-pronged test requires the Board establish the injunction request is "just and proper".

1. *This Court Should Require Section 10(j) Injunctions Be Supported By "A Likelihood Of Success On The Merits".*

Because "Section 10(j) is itself an extraordinary remedy", *Pilot Freight Carriers*, 515 F.2d at 1192, this Court should require the Board to establish it has sufficient legal and factual basis before it invokes Section 10(j)'s sweeping power. Simply put, the "reasonable cause" prong of the two-part test does not demand a sufficient evidentiary showing prior to granting the Board broad equitable authority.[12] By contrast, the "likelihood of success on

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8. *Kobell v. Suburban Lines, Inc.*, 731 F.3d 1076, 1084-89 (3d Cir. 1984).

9. *Boire v. Pilot Freight Carriers, Inc.*, 515 F.2d 1185, 1189-93 (5th Cir. 1975).

10. *Gottfried v. Frankel*, 818 F.2d 485, 493-95 (6th Cir. 1987).

11. *Angle v. Sacks*, 382 F.2d 655, 658-60 (6th Cir. 1967).

12. The Third Circuit has found that the "reasonable cause" prong is met so long as the Board's legal theory is "substantial and not frivolous". *Suburban Lines*, 731 F.2d at 1084. Additionally, the Board's (Cont'd)

the merits" prong of the traditional test for injunctive relief is concrete. It is a substantial criterion for the Board to fulfill before it may qualify for the extraordinary relief offered by Section 10(j).

2. *Courts Should Apply The Last Three Prongs of the Four-Part Test To Determine Whether Injunctive Relief Is Just and Proper.*

The final three prongs of the traditional test for injunctions in federal court more completely evaluate the impact on the community of alleged unfair labor practices. After discerning the likelihood of success on the merits, the traditional test requires courts to 1) decide whether irreparable harm is likely, 2) evaluate potential harm to other interested parties, and 3) ensure the proposed injunction is in the public interest. Such a detailed review should precede granting of the dynamic, broad-based relief offered by a Section 10(j) injunction.

In contrast to these wide range of factors, the "just and proper" analysis has been constrained to issues related to collective bargaining. As the Third Circuit posits, "it is just and proper to issue a Section 10(j) injunction when the nature of the alleged

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(Cont'd)
factual findings are judged by a deferential "clearly erroneous" standard. *Gottfried*, 818 F.2d at 493. As the Sixth Circuit describes it:

> [the Board] has a relatively insubstantial burden in that [it] need not prove that an unfair labor practice has occurred, but must only produce *some* evidence in support of the petition. Further, [the Board] need not convince the court of the validity of the Board's theory of liability, as long as the theory is substantial and not frivolous.

Id., *citing*, *inter alia*, *Suburban Lines*, 731 F.2d at 1084 (Emphasis added). *See also Townsend Culinary, Inc.*, 1998 WL 687228 at * 2 ("reasonable cause" standard fulfilled "if there is any evidence which together with all the reasonable inferences that might be drawn therefrom supports a conclusion that there is reasonable cause to believe a violation has occurred").

unfair labor practices are likely to jeopardize the integrity of the bargaining process. . . ." *Pascarell v. Vibra Screw Inc.*, 904 F.2d 874, 878 (3d Cir. 1990). *See also Angle v. Sacks*, 382 F.2d 655, 660 (10th Cir. 1967) ("The circumstances of the case must demonstrate that there exists a probability that the purposes of the Act will be frustrated . . ." for Section 10(j) relief to be "just and proper").

The health care industry strongly urges this Court to require federal courts to weigh the traditional full spectrum of interests — not just collective bargaining concerns — to ensure Section 10(j) injunctive relief is truly equitable.

C. The Two-Prong Test For Section 10(j) Injunctions Impermissibly Restrains Federal Courts' Exercise of Their Remedial Authority.

This Court's precedent also counsels that federal courts not be constrained in exercising their equitable injunction authority. In *Weinberger v. Romero-Barcelo*, 456 U.S. 309, 102. S. Ct. 1798 (1982), this Court evaluated whether a statute *required* a federal court to enjoin activities if conditions described in the statute were not met. This Court stressed that an injunction is an extraordinary remedy requiring balancing of relative benefits and injuries to the parties and the public, and how these would be affected by granting or withholding an injunction. 456 U.S. at 312, 102 S. Ct. at 1803. As a result, injunctive relief has never been approached as a matter of right, but rather as the province of the court after a careful evaluation of all relevant interests. *Id.*

> The grant of jurisdiction to ensure compliance with a statute hardly suggests an absolute duty to do so under any and all circumstances, and a federal judge sitting as a chancellor is not mechanically obligated to grant an injunction for every violation of law.

456 U.S. at 313, 102 S. Ct. at 1803.

By impermissibly limiting the district court's scope of review, the two-pronged test propounded by the Board offends both the letter and spirit of *Romero-Barcelo*. In that regard, the Seventh Circuit's analysis is compelling:

> Section 10(j) tells the district court to do what's "just and proper," which we read as a statement that traditional rules govern — the approach emphasizing the public interest applied — when the government is the plaintiff. The Director's likelihood of success on the merits *does* matter when it comes to determine whether an injunction is "just and proper". . . .

Kinney v. Pioneer Press, 881 F.2d at 491 (emphasis in original). Accordingly, the Seventh Circuit relied on *Romero-Barcelo* in holding the four-part test appropriate for 10(j) proceedings. *Id.*

The "reasonable cause" prong of the two-part test has no basis in Section 10(j). Rather, this language appears in Section 10(l), 29 U.S.C. § 160(l), a statute which specifically *requires* the Board to pursue injunctive relief if it finds reasonable cause to believe that one of the enumerated violations occurred. Section 10(j), however, does not expressly "restrict the court's jurisdiction in equity." *Romero-Barcelo*, 456 U.S. at 313, 102 S. Ct. at 1803-04. Because Section 10(j) provides no basis for limiting judicial discretion beyond the traditional test, application of the Board's test violates *Romero-Barcelo*.

D. The Instant Matter Provides Compelling Rationale For Abandoning The Board's Two-Pronged Test.

During oral arguments in the present case, the district court expressed serious concern regarding the merits of the Board's application of Section 8(g):

> I want to say this, I wouldn't resolve the statutory interpretation issue the way the Board did. I don't read the statute that way.

(Petition, Apdx D-56). This sentiment is reflected as well in the district court's opinion granting preliminary relief. "Although the bare language of the statute makes no mention [of the 72-hour unilateral extension]. . . ." (Petition, Apdx C-19). The district court nonetheless felt constrained by the Third Circuit's application of the Board's two-pronged test (Petition, Apdx C-40, 41). Additionally, the district court interpreted the "reasonable cause" prong as eliminating its ability to analyze Section 8(g) at all before granting the Board's injunction request. It appears clear that had the district court applied the traditional equitable test, its analysis of the Board's interpretation of Section 8(g) would have resulted in denial of the injunction request. Since, as discussed in Point I, *supra*, the Board's interpretation of Section 8(g) has no basis in the statute, denial of the injunction would have indeed been the result required by Section 8(g).[13] The AHCA joins Petitioners in urging this Court to apply its precedent and to not require district courts to merely "rubber stamp" the Board's patently untenable interpretations of the Act.

CONCLUSION

For the foregoing reasons, the AHCA urges this Court to issue the writ requested. Additionally, this Court should require the Board to abandon its baseless interpretation of Section 8(g) which eviscerates the ten-day notice requirement expressly provided in the statute. Finally, this Court should resolve the conflict among the Courts of Appeals and require district courts to apply the traditional four-part test in evaluating Section 10(j) injunction requests.

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13. Since the Board's extra-statutory interpretation of Section 8(g) does not even survive review under a "substantial and not frivolous" standard, the injunction should have been denied under the two-pronged test for Section 10(j) injunctive relief.

Respectfully submitted,

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